

No. 89-459

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DELTA AIR LINES, INC.,

Petitioner,

v.

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The District Of Columbia Circuit

SUPPLEMENTAL BRIEF OF DELTA AIR LINES, INC.,
IN RESPONSE TO THE BRIEF FOR THE UNITED
STATES AS AMICUS CURIAE

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SUPPLEMENTAL BRIEF OF
DELTA AIR LINES, INC., IN RESPONSE
TO THE BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

INTRODUCTION

Petitioner Delta Air Lines, Inc. ("Delta") requests that the Court consider this response to the brief submitted by the Solicitor General ("S.G.") on March 13, 1990 on behalf of the United States.¹ The reasons for Delta's request are as follows:

1. The S.G.'s brief deals with the recent decision of the Second Circuit Court of Appeals in *Flight Engineers International Association v. Pan American World Airways, Inc.*, No. 89-7911, slip op. (2d Cir. Feb. 13, 1990) ("*FEIA*"), which case is particularly pertinent here because it compounds the already existing conflict among the various circuits. In Delta's view the S.G. does not deal adequately with *FEIA* and attempts to minimize the conflict between it and the present case, although conceding that *FEIA* "is in some tension" with the D.C. Circuit's decision in the present case. The discussion below demonstrates that *FEIA* not only is in "some tension" with the D.C. Circuit decision, but that there is a firm and distinct conflict between the D.C. Circuit decision in this case and cases in the Second and other circuits.²

2. The S.G. argues that the D.C. Circuit decision is fully consistent with the statutory plan of the Railway Labor Act because ordering arbitration on the issue of damages will

¹ References to the Solicitor General's brief will be cited as "S.G. Brief, p. ____."

² Counsel for Delta has been advised that counsel for *FEIA*, the union in *FEIA v. Pan Am*, also believes that *FEIA* is directly in conflict with the present case and that counsel for *FEIA* intends to file today or shortly thereafter a petition to seek review of that case by this Court. Accordingly, the Court may wish to hold the present matter in abeyance until it has had an opportunity to review the petition to be filed in *FEIA*, which reinforces the need to grant certiorari in this case.

in no way interfere with the exclusive jurisdiction of the National Mediation Board ("NMB") over representation disputes. What the S.G. overlooks is that the question is one of jurisdiction over the subject matter of the dispute, not of remedies. If a contractual provision attempts to affect representation—as does the successorship provision here—only the NMB has jurisdiction to consider a dispute concerning that provision and a court has no jurisdiction to order arbitration of such a dispute. As Delta shows below, the distinction between remedies in the form of damages and injunctive relief is irrelevant in the analysis of whether the courts have jurisdiction to order arbitration because the question is whether the dispute involves representation, not the nature of the relief sought.

3. The S.G. argues that the law should be allowed to develop further before the Court decides the issue. Delta shows below that the conflict between the circuits is fully developed and that there is no basis upon which to postpone deciding the issues presented by this case.

DISCUSSION

A. Conflicts with Other Circuits

1. *Flight Engineers International Association v. Pan American World Airways, Inc.*

The dispute in *FEIA* arose when Pan American World Airways ("Pan Am") acquired another airline, Ransome Airlines, Inc. ("Ransome"), in the same way that Delta's acquisition of Western Air Lines ("Western") led to the present dispute. Unlike Delta-Western, however, Pan Am continued to operate Ransome as a separate airline. *FEIA* claimed that by reason of its collective bargaining agreement with Pan Am, Pan Am was required to utilize *FEIA*-represented employees to perform all applicable work on any airline, such as Ransome, which was owned or operated by Pan Am.

When Pan Am refused to honor *FEIA*'s claim, *FEIA* filed a grievance, which it sought to have referred to a

System Board of Adjustment for arbitration. FEIA requested as relief both the assignment of work to the FEIA-represented personnel and damages. (Both forms of relief traditionally are requested in all labor arbitration proceedings, as they were in the present case and as they would have been in all of the other RLA cases cited in the parties' previous briefs and in the S.G.'s brief.) Pan Am refused to submit the matter to the System Board, asserting that FEIA's grievance raised a representation dispute within the exclusive jurisdiction of the National Mediation Board ("NMB"), and FEIA filed suit.

In January of 1988, while FEIA's lawsuit was pending in the district court, the Second Circuit decided in Pan Am's favor another case involving the same issues raised by another union arising out of the same acquisition of Ransome. *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 836 F.2d 130 (2d Cir. 1988) (per curiam), *aff'd*, 664 F. Supp. 156 (S.D.N.Y. 1987). Thereafter FEIA amended its grievance to eliminate any claim to specific performance but continued to seek damages. The district court nevertheless ruled in favor of Pan Am, holding that the System Board did not have jurisdiction because the grievance raised a representation dispute within the exclusive jurisdiction of the NMB, regardless of the relief sought. On February 13, 1990 the Second Circuit affirmed. A copy of the Second Circuit's opinion is reproduced as the Appendix, *infra*.

In substance, the FEIA opinion and its reasoning are in direct conflict with the D.C. Circuit's opinion in the present case. Pages 5 and 6 in particular contain a confirming discussion of the essential arguments asserted in Delta's briefs in the present case, particularly the fact that a union would be likely to use the threat of a large damage award to avoid the NMB's policies and to secure guaranteed future representation status to which it would not otherwise be entitled. App., 4a-5a, *infra*. The Second Circuit expressly rejects FEIA's argument that the Second Circuit's earlier decision in *IUFA* can be distinguished on grounds that FEIA seeks only damages. The Second Circuit specifically notes

that IUFA sought damages in addition to specific performance. (*FEIA*, slip op., at 6, App., 4a, *infra*)

In the last paragraph of the opinion, however, the Second Circuit, after having affirmed the district court's reasoning and after noting that it "would ordinarily stop at this point," addresses the D.C. Circuit's decision in the present case. The Second Circuit asserts that the present case is inapposite for two reasons. The first is that the present case is contrary to controlling precedent in the Second Circuit (*i.e.*, *IUFA*). The second is that, by the time of the D.C. Circuit's decision in the present case, the NMB had ruled on the representation issues raised by AFA. Thus, as an alternative reason, the court states in dictum that the present case might be distinguished on the basis that a court order compelling arbitration of AFA's claim could not interfere with the NMB's exclusive jurisdiction because the NMB had already issued a ruling in the matter.

Delta maintains that the Second Circuit's alternative reasoning in this regard is factually and legally incorrect, for several reasons. First, in the case which the Second Circuit cites as controlling precedent, *IUFA v. Pan Am*, the NMB had issued a ruling on the representation issues raised by IUFA's complaint subsequent to the district court's ruling but before the Second Circuit's ruling, just as the NMB did in the present case. In *IUFA* the Second Circuit had said "We believe that these events underscore the correctness of the district court's decision that representation issues within the jurisdiction of the Mediation Board are implicated in the instant matter." 836 F.2d at 131. Moreover, in *FEIA*, slip op., at 6, App., 4a, *infra*, the Second Circuit explicitly notes that the union in *IUFA* also sought "make whole" relief, "*i.e.*, money damages, as *FEIA* does here." Despite the fact the NMB had already determined the representation issue in *IUFA*, the Second Circuit refused to order arbitration of either the specific performance or damage issues. Accordingly, even if *FEIA* somehow were distinguishable from Delta on this basis, a clear and unequivocal conflict still remains between the present case and *IUFA* (as well as with the Ninth Circuit decision in *IBTCHWA*,

Local No. 2702 v. Western Air Lines, Inc., 854 F.2d 1178 (9th Cir. 1988)). Thus, every Circuit decision (other than the present case) in which a separate damage issue was expressly asserted (two in the Second Circuit and one in the Ninth), rejects such a claim and reaches the same conclusion as all of the other cases cited in our briefs, even through the NMB had already issued a ruling in two of those three cases.

Moreover, under the Second Circuit's alternative reasoning in *FEIA*, a U.S. District Court's subject matter jurisdiction would depend solely upon the vagaries of the timing of another agency's ruling. Such a standard is, to our knowledge, without any legal basis and it would cause such terribly inconsistent results and create such incentives for parties to try to affect the timing of the rulings by courts and agencies that it would be utterly unworkable. It should be noted in this regard that, at the time AFA's grievance was filed in the present case, and at the time that the district court issued its ruling on AFA's complaint, the NMB had *not* ruled on the representation issues.

Even the S.G. agrees that the Second Circuit's rationale in dictum distinguishing *FEIA* and the present case is inappropriate. (See S.G. Brief, p. 16, n. 11.) The S.G. instead asserts that the cases are different on their facts because in *FEIA* the damages sought by the union for breach of the collective bargaining agreement would be triggered every time the acquiring carrier assigned work to an employee not represented by the union. In the present case, in contrast, the damages presumably would be levied in one fell swoop. If, as the S.G. seems to accept, "an award of the damages sought [in *FEIA*]-or even a realistic threat of such an award-would have the same practical effect" on representation rights as an injunction (see S.G. Brief, p. 16, quoting *FEIA*, slip op., at 6), it is difficult to understand how a similar threat based upon a successor clause as in the present case (with a potentially greater damage award) would not have a similar effect with respect to future transactions, and, indeed, with respect to this transaction. (See discussion at p. 10, *infra*.)

Contrary to the S.G.'s suggestion, there is nothing speculative about those effects. For example, in future transactions (regardless of the manner in which the transactions are structured), one or more unions would be likely to file or threaten a substantial damages claim as soon as the transaction is announced or agreed upon, with the goal, not of proceeding with the damages claim, but rather of using the threat to guarantee or enhance the future representational status of that particular union. That is precisely what the Second Circuit in *FEIA* found to be impermissible under the RLA's statutory scheme. *FEIA*, far from being different from the present case on its facts, demonstrates that whenever one carrier acquires another, no matter what the form of the transaction may be, unions, if permitted to do so, will seek to use the threat of damages to avoid the NMB's jurisdiction over representation issues. In this regard, both *FEIA* and *IUFA* directly conflict with the rationale of the D.C. Circuit in the present case.

B. Other Cases

Although the S.G. concedes (S.G. Brief, p. 14.) that "the unions in some of the [other] cited cases may have expressly or implicitly sought damages in addition to equitable relief" (just as AFA sought both forms of relief in the present case), the S.G. claims that "the heart of the claim in each instance was a request for prospective relief affecting ongoing labor relations." This does not change the fact that, even after prospective relief in the form of specific performance was denied, in none of the cases was a union permitted to pursue the damages portion of its claim. Thus, the holdings in those cases, and the rationales cited in support of those holdings, are in direct conflict with the holding and rationale of the D.C. Circuit in the present case, as discussed in Delta's Petition at pages 14-21.

2. The S.G. Incorrectly Argues That The Decision Of The D.C. Circuit Is Consistent With The Statutory Scheme Of The Railway Labor Act.

The S.G. says that allowing arbitration on the damages issue in this case is fully compatible with the statutory plan

under which representation disputes are within the exclusive jurisdiction of the NMB and minor disputes are within the exclusive jurisdiction of arbitrators. (S.G. Brief, p. 6.) His assertion is incorrect, however, because he has failed to recognize that when disputes involve both representation issues and contract issues, the courts have consistently held that the exclusive jurisdiction of the NMB must prevail even though this means that intertwined contract disputes may not be resolved. The S.G. expresses concern that if Delta's position were accepted, the successorship provision would be rendered "unenforceable in the present context" (S.G. Brief, at pp. 11-12.), and he argues that such unenforceability cannot be justified unless the provision is contrary to public policy which "must be well-defined, and is to be ascertained 'by reference to the laws and the legal precedents and not from general considerations of supposed public interest,'" citing *W. R. Grace & Co. v. Local Union 759, International Union of Rubber Workers*, 461 U.S. 757, 766 (1983).

The fact of the matter is that in this context, public policy is indeed well-defined and is ascertained by reference to the Railway Labor Act and numerous cases decided thereunder which deal specifically with this issue. These are, of course, the cases that Delta has cited earlier and which Justice O'Connor described as "the great weight of case law" in this area. *Western Airlines, Inc. v. International Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987).

The S.G. fails to recognize this, and instead asserts that this case is governed by *Grace and Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). Those cases are quite different, however, from the present case. In the present case, Delta is *not* asserting a defense based upon conflicting contractual obligations as was the case in *Grace and Belknap*. In those cases, the employers had entered into contractual obligations with federal government agencies and the employers said their actions were required under such contractual arrangements, excusing them from other duties. In those cases, this Court held that entering into a contractual ob-

ligation with a government agency could not excuse the breach of other duties. In the present case, Delta does not assert that it should be excused from honoring the successorship clause because of any conflicting contractual duty. Thus, the principles set forth in the *Grace* and *Belknap* cases are inapposite to this case. The question presented here relates only to whether the successorship clause may be enforced under the applicable provisions of the Railway Labor Act and decisions under that Act; *it has nothing to do with any conflicting contractual obligation of Western or Delta*. In dealing with the issue the courts have not found it necessary to deal with the question of enforceability as such because they never got that far. *The reason is that they first had to deal with the question of jurisdiction*. The courts have decided in the cases previously cited that where representation questions are intertwined with contract issues, the NMB's exclusive jurisdiction must be honored and that the courts have no jurisdiction to order arbitration of the related contractual issues.

In this connection, it seems helpful to consider the nature of the successorship clause. Quite clearly, one of the primary purposes of the union in negotiating such a clause was to attempt to assure its continued representation status *by contract*. The interpretation of any such contract necessarily involves issues of representation that otherwise would be resolved by the NMB and, accordingly, any interpretation of such a provision by an arbitrator *must* result in a determination affecting representation. It is no answer to say that because the NMB has already decided representation this cannot be changed by an arbitrator. Nor is it an answer to say that the provision does not really deal with representation because an arbitrator might find that it only required Western "to structure any merger so as to preserve the independent identity of [Western's] operations, and thereby to bind Western's successor to the AFA collective bargaining agreement." (S.G. Brief, p. 8.) *Neither of those facts changes the crucial fact that the clause attempts to control representation through contract and not through the NMB's processes pursuant to 45 U.S.C. § 152 Ninth*. If the

contract could have the effect of controlling representation then an arbitrator in interpreting the contract is deciding matters of representation in violation of the NMB's exclusive jurisdiction, and a court would similarly violate that jurisdiction by ordering arbitration of such a clause. There is no occasion to consider whether a damage award would interfere with the NMB's exclusive jurisdiction because the analysis should never go that far.

Moreover, the distinction that the union and the S.G. have tried to draw between damages and injunctive relief is misconceived in this context. As the Second Circuit recognized in *FEIA*, the threat of a damage award can be just as compelling as injunctive relief insofar as matters of representation are concerned. Even though in the present case the NMB has ruled that the AFA's right to represent the former Western employees was terminated, and even though an arbitrator cannot change that decision, there could still be a direct effect on representation if an arbitrator is allowed to decide that Western somehow breached its successorship obligation with the result that Delta could be subject to a substantial damages award. If that should occur, the union could place significant pressure on Delta to voluntarily recognize the union as the representative of former Western employees or all of the merged craft or class of flight attendants. Such a result would invade the NMB's exclusive jurisdiction *and* would be inconsistent with the provisions of the Railway Labor Act, which are intended to guarantee that a majority of the employees in a craft or class will be allowed to select their representative.

3. The S.G. Incorrectly Argues That There Should Be Further Development of the Law Before the Court Decides This Issue.

The S.G. says "Given the paucity of decided cases dealing with claims solely for damages, we believe that further development of the law in the lower courts would be desirable." (S.G. Brief, p. 17.) It is difficult to see how the conflict between the circuits could be more clear or what could be gained from further litigation. To the contrary, a

great deal could be lost through allowing the uncertainty created by the D.C. Circuit decision to continue. As we have pointed out in earlier briefs, the uncertainty created by the D.C. Circuit decision is a very real and subsisting problem that could affect decisions as to whether transactions will occur, and if so, how they will be structured. Perhaps more importantly, employee representation rights under the Railway Labor Act will have been distorted.

Despite the S.G.'s arguments, there is a distinct conflict between the D.C. Circuit decision and all other circuit decisions in this area. The S.G.'s argument that other cases had not clearly examined the damages issue is incorrect in view of the recent *FEIA* decision, as well as the earlier decision of the Second Circuit in *IUFA*. Moreover, damages were necessarily a possible remedy in all the other cases cited in earlier briefs, as the S.G. concedes.

For the foregoing reasons, Delta again respectfully requests that its Petition be granted. In the alternative, Delta requests that the Court hold the matter in abeyance until it has had a chance to review the Petition for a Writ Certiorari in *FEIA v. Pan Am*.

March 23, 1990

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 701

August Term 1989

Argued: January 18, 1990 Decided: February 13, 1990

Docket No. 89-7911

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION,
PAA CHAPTER, AFL-CIO,
Plaintiff-Appellant,

- against -

PAN AMERICAN WORLD AIRWAYS, INC., and
PAN AMERICAN CORPORATION,
Defendants-Appellees.

Argued: January 13, 1990 Decided: February 13, 1990

Before: FEINBERG, PRATT and MAHONEY, Circuit Judges.

Appeal from judgment of United States District Court for the Southern District of New York, Peter K. Leisure, J., granting motion of defendants-appellees Pan American World Airways, Inc. and Pan American Corporation to dismiss complaint of plaintiff-appellant union, which sought an order compelling arbitration, for lack of subject matter jurisdiction.

Affirmed.

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(O'Donnell & Schwartz, of Counsel),
for Plaintiff-Appellant.

RICHARD SCHOOLMAN, New York, NY
(Eikenberry Futterman & Herbert, of
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FEINBERG, Circuit Judge:

Plaintiff-appellant Flight Engineers' International Association (FEIA) appeals from a judgment of the United States District Court for the Southern District of New York, Peter K. Leisure, J., granting the motion of defendants-appellees Pan American Corporation (Pan Am Corp.) and Pan American World Airways, Inc. (PAWA) to dismiss the amended complaint for lack of subject matter jurisdiction. Pan Am Corp. is a holding company and is not an airline; PAWA is its wholly owned airline subsidiary. The amended complaint charged that Pan Am Corp. and PAWA violated section 204 of the Railway Labor Act (the Act), 45 U.S.C. § 184, and the parties' collective bargaining agreement (the Agreement) by refusing to arbitrate what FEIA characterized as a contractual dispute arising under Article 1(B) of the Agreement. Article 1(B), known as a scope clause, requires PAWA to use exclusively FEIA-represented Operations Training Instructors (OTI's) employed by PAWA to perform instructional work in designated areas involving the training of flight engineers, flight personnel and maintenance personnel. By a letter of agreement dated February 19, 1986, Pan Am Corp. agreed that it, or any successor, would be bound by Article 1 of the Agreement.

In April 1986, Pan Am Corp. acquired a small regional airline, Ransome Airlines, Inc. (Ransome), which was later renamed Pan Am Express, Inc. After becoming a wholly owned subsidiary of Pan Am Corp., Ransome continued to use its own employees as training personnel, rather than the OTI's employed by PAWA and represented by FEIA. None of the approximately 16 Ransome training personnel is represented by FEIA; some are represented by other unions and some are not represented by any union.

In August 1966, FEIA filed a grievance, alleging that Pan Am Corp. had violated Article 1 of the Agreement "by the failure of its subsidiary, Ransome Airlines to em-

ploy OTI's in accord with the Agreement." Pursuant to the Agreement, FEIA sought to have its grievance referred to a Board of Adjustment for arbitration and requested as relief both the assignment of work to the OTI's and backpay for all OTI's damaged by the contractual violation. Pan Am Corp. and PAWA took the position that the grievance involved a representation issue within the exclusive jurisdiction of the National Mediation Board (NMB), and refused to submit to arbitration unless required to by a court of competent jurisdiction. In September 1987, FEIA instituted this action.

In January 1988, this court decided in defendants' favor another case involving similar issues raised by another union arising out of the same acquisition of Ransome by Pan Am Corp. Independent Union of Flight Attendants (IUFA) v. Pan American World Airways, Inc., 836 F.2d 130 (2d Cir. 1988) (per curiam), aff'g 664 F. Supp. 156 (S.D.N.Y. 1987). Thereafter, FEIA amended its grievance to eliminate any claim to work reassignment but continued to seek damages. Defendants maintained their refusal to submit the dispute to a Board of Adjustment.

In an opinion filed in July 1989, and reported at 716 F. Supp. 110, Judge Leisure dismissed the complaint for lack of subject matter jurisdiction. The judge held that the dispute implicated representation issues within the exclusive jurisdiction of the NMB pursuant to § 2 Ninth of the Act, 45 U.S.C. § 152 Ninth, and that resolution by a Board of Adjustment acting pursuant to § 204 of the Act, 45 U.S.C. § 184, and Article 23 of the parties' Agreement was thus precluded, at least in the first instance. The court believed that our recent decision in *IUFA*, mentioned above, controlled the disposition of this case. In *IUFA*, a flight attendants' union sought to compel arbitration of its claim that Pan Am Corp. and PAWA had violated the scope clause of their collective bargaining agreement by failing to employ flight attendants represented by IUFA on Ransome flights. The district court dismissed the com-

plaint for lack of subject matter jurisdiction, and we affirmed.

On appeal, FEIA continues to argue, as it did in the district court, that this case is distinguishable from *IUFA* because FEIA seeks only a retroactive award of damages resulting from defendants' noncompliance with a scope clause and not, as the union sought in *IUFA*, a prospective order reassigning work to members of its bargaining unit. FEIA contends that a claim for damages, unlike a claim for work reassignment, does not involve the resolution of representation issues since it calls for only a factual determination under the FEIA Agreement of whether the individuals who received the challenged work were OTI's working under the Agreement.

We disagree. As the district court correctly noted, although this case may not present "a traditional dispute over representation," 716 F. Supp. at 115, it presents the same factors which, for the *IUFA* court, had implicated representation concerns within the exclusive jurisdiction of the NMB, i.e., whether the union's certification applied to the subsequently acquired Ransome subsidiary and whether the two related airlines should be treated as a single carrier for representation purposes. See *IUFA*, 664 F. Supp. at 159; see also *Western Airlines, Inc. v. International Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., sitting as Circuit Justice) ("The great weight of the case law supports the proposition that disputes as to the effect of collective-bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board."). Moreover, despite FEIA's effort to characterize *IUFA* as only a work reassignment case (concededly within the jurisdiction of the NMB), the union there also sought "make whole" relief, i.e., money damages, as FEIA does here. In addition, an award of the damages sought here—or even a realistic threat of such an award—would have the same practical effect as work

reassignment on settling representation issues by extinguishing the possibility of a separate Ransome bargaining unit. No company in its right mind would continue to pay twice for the same work; it would take steps to transfer the work, if it could. Thus, like the district court, we reject FEIA's characterization of the present conflict as involving solely a "minor dispute," that is, a dispute over the interpretation or application of existing collective bargaining agreements, which under § 204 of the Act, 45 U.S.C. § 184, is committed to an authorized Board of Adjustment for resolution.

FEIA also argues that if the dispute is referred to the NMB, the scope clause will be rendered a nullity, since the NMB lacks jurisdiction to enforce the terms of collective bargaining agreements. FEIA maintains that this would deprive OTI's of the fruits of their 1986 bargain with appellees Pan Am Corp. and PAWA and would unjustly secure for appellees the concessions made in exchange for the work assignment agreement. Such a result, FEIA says, would also run counter to the statutory purposes of section 2 First of the Act, 45 U.S.C. § 152 First, which imposes on carriers a duty to "make and maintain agreements." We are not persuaded. As the district court pointed out, the NMB "must have the opportunity to define how, and by whom, groups of employees in this airline merger situation are to be represented"; only after the NMB's determination "may the union and the employer, or their arbitrator, establish or interpret contractual working conditions." 716 F. Supp. at 116.

In short, we would ordinarily stop at this point and affirm for the reasons given by the district court were it not for FEIA's final argument. FEIA asks us to follow the decision of the D.C. Circuit in *Association of Flight Attendants v. Delta Air Lines, Inc.*, 879 F.2d 906 (D.C. Cir. 1989), decided after the district court's opinion in this case. The D.C. Circuit held, in the context of an airline merger, that the district court had jurisdiction to order

arbitration of the union's claim for damages against the surviving carrier, which was based on the alleged violation of a successorship clause in the union's contract with the absorbed carrier. Appellant's reliance on the *Delta* decision is inapposite for two reasons. First, as indicated above, we do not write upon a blank slate in this area, in view of our controlling precedent in *IUFA*. Second, by the time of the D.C. Circuit's *Delta* decision, the merger had been consummated and the NMB had retroactively extinguished the union's certification (since that union then represented only a minority of the relevant class of employees); thus, in view of the NMB's conclusive determination of the representation issue, a court order compelling arbitration of the damages claim would not interfere with the NMB's exclusive jurisdiction. Such a conclusive determination of the representation issue, without the interference of the threat of an award, is precisely what is lacking here.

The judgment of the district court is affirmed.

